Consumer Finance Monitor Podcast (Season 8, Episode 51): Fair Lending Developments Under Trump 2.0 – Part 2

Speakers: Alan Kaplinsky, Richard Andreano, Jr., John Culhane, Jr. and Bradley Blower

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor Podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm. And I'm your host, Alan Kaplinsky, the former practice group leader for 25 years and now senior counsel of the Consumer Financial Services Group at Ballard Spahr. And I'm very pleased to be moderating today's program.

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Brad, can you lay out how the policy has changed repeatedly in the last eight years and where we're headed, particularly the change in how the federal government views fairness today?

Bradley Blower:

Sure. And I'll be trying to be as brief as I can about this. Essentially, under the disparate impact rule, it's a three-part test. It's a burden shifting analysis that you have to do as a court. And first of all, plaintiff is required to make a prima facie claim of impact. There's some kind of adverse impact by a neutral policy or rule or model. And then the burden is to determine if there's a legitimate... The business can make in response to that proof by the plaintiff of a prima facie case, that there's some kind of legitimate non-discriminatory business justification for the policy, the model, the rule that can't be accomplished by another less discriminatory alternative.

Bradley Blower:

And the third prong is, is there a less discriminatory alternative? And there's a lot of debate about who has to prove that. I think the traditional view is the plaintiff has to prove that, but in the area of AI, it's a little harder for people outside of a company or a creditor to get that information. So there's been a little bit of shifting of, well, maybe the creditor is part of good business practices. Compliance management needs to be able to demonstrate LDA. And so that was the disparate impact rule pre-Biden administration.

Bradley Blower:

And then the Trump administration, the first Trump administration came in and put out its own disparate impact rule by HUD and added basically a much higher burden that you needed to prove. You needed to prove that a practice or a neutral policy was arbitrary and unnecessary. And there were other restrictions that were put in as well. Then you had the Biden administration come back in, rescind the HUD rule and say, "No, we're going back to this pure three-part test." And now you have the Trump administration reviewing it again. And the concern is that there will be a lot of language put in that will just make it impossible to ever bring a claim as a plaintiff under a disparate impact.

Bradley Blower:

It will reincorporate the arbitrary. You have to prove a policy is arbitrary and unnecessary. That's a very high standard to meet. There might also be language that allows you to point the finger at third parties and say, "Hey, I hired third parties to develop this model. I don't need to prove what they're doing didn't create disparate impact." And that's your burden to show that the third party has done that. So that's been the shift from the three-part test to add on requirements that will make it much harder to make a claim.

Alan Kaplinsky:

John or Rich?

Richard Andreano, Jr.:

Yeah, I joke that there may be some attorneys who for their entire career have been working on the HUD disparate impact rule lawsuits because the suit filed against the original rule in 2013 is before the DC Court of Appeals, though it's currently stayed because the Trump administration has said they're going to revisit that rule to make it, we assume, closer to inclusive communities. They said they did that in the first Trump administration rule, but they went well beyond inclusive communities. People said, "Did they raise the hurdle?" I said, "I think you're looking at a pole vault for a plaintiff now to bring a claim." And the court, it was quickly struck down by a court. Although the court did recognize both, said both sides overstated their case. That some language that the plaintiffs were complaining about, they said that language actually is in inclusive communities.

Richard Andreano, Jr.:

But again, I think what the goal here may be is to get out a rule, have litigation continue and have it brought up finally to the Supreme Court. Now, we do have inclusive communities where in a 5-4 decision the Supreme Court said, "Yes, you can read disparate impact claims under the Fair Housing Act." It was written by former Justice Kennedy. And what I thought the Trump administration goal originally would be is, well, they may not overturn it, but we could have them verify a very high burden, but I'm not so sure that they wouldn't revisit inclusive communities at this point.

Richard Andreano, Jr.:

With this court we've seen precedent isn't particularly something they necessarily feel bound by anymore if they disagree with that precedent. So their goal also may be to get that through the HUD rule to get the issue again before the Supreme Court, "Can you bring disparate impact claims?" And if you can't, then that would end the argument unless Congress went back and revised the statute. If they say you can, what they could do is make the pleading standard very difficult to get there. So I again think this may be trying to get an issue before the Supreme Court through [inaudible 00:07:28].

John Culhane, Jr.:

I would just add to that that I think we'll have a better idea where that's going once we see the HUD proposal. If it looks like it's going way beyond the inclusive community's language, then I think that clearly that's the goal of the Trump administration, is to take the case back to the Supreme Court. If it brings in causation a little more clearly, but that's all it does, then maybe not so much.

Bradley Blower:

And Alan, I would add, we're seeing a pattern in our discussion here of huge pendular swings, changes back and forth on various rules. And it really doesn't serve either the business community or consumers to have lack of clarity and clear rules of the road. So I think both the business community and the consumer advocacy community and civil rights community are concerned that with all these changes from one administration to another, it creates this morass of rules that is very hard to understand, let alone changing the burdens of proof along the way.

Alan Kaplinsky:

Well, not only that, some clients have a tendency to think that the Trump philosophy is going to last forever, and they forget about the fact that there is an end to his term in about three years. And who knows? There may be a Democratic president, could be somebody very progressive, and things could shift again. And it just becomes the task of banks and other consumer financial services companies today in trying to figure out what do they do? What are the rules of the road? You can't figure them out. And we as lawyers, we can't really predict what's going to happen. We don't know what's going to happen. We can have a pretty good idea what's going to happen during the remainder of the Trump term, but after that, who knows?

Bradley Blower:

Well, and case in point, we talked about the redlining initiative by the Biden administration. Those were mostly cases against lenders who were redlining during the first Trump administration. They were looked back. So they were looked back efforts by the Biden administration to look back at conduct that was before Biden. So you could have a new administration come back and do that as well. My advice to lenders and others trying to figure out this morass is you've got three and a half years, three years to get your ducks in a row. I mean, don't take your foot off the gas. Keep your foot on... You don't need to put the gas all the way down, but you should put it down to a point where you're comfortable with your compliance management system. You're not going to get foot faulted by the federal government. So use this time to get your ducks in a row, and lawyers can help with that.

Alan Kaplinsky:

You agree with that, Rich?

Richard Andreano, Jr.:

Yeah. What I'm hearing, at least from the mortgage industry so far, and we'll see if this lasts for the full Trump administration, is stay the course. It's we have compliance management systems, we have fair lending policies. Let's just keep doing what we've been doing, audit our HMDA results and our internal data. If we see problems, figure out what's causing it and address it because they know, look, at some point there will be a Democratic administration. And particularly if it comes right after the Trump administration, they may aggressively decide to swoop in and figuring that people took their foot off the gas for the prior four years and they're going to be in a lot of shops looking for things. So people get that. So rather than dismantle their consumer finance management system and then start it up again, the easier thing, frankly, is just to keep it going.

John Culhane, Jr.:

The only thing I would add is I think that it's also the case in building underwriting decision making tools that people who are working on those are very mindful of the fact that the Trump administration's years are limited and they're going to have to defend those tools under a new administration and at some point under a Democratic administration. So I think there is a fair amount of care being undertaken right now.

Bradley Blower:

And some of the rules like the third party management rules and the model management risk rules haven't changed. You still need to model, you need to have governance. And you're going to put a target on the back if you don't mind your back.

Alan Kaplinsky:

Let's move to something else you refer to, Brad, in your opening remarks, namely the small business data collection rule. I think it's 1071 of Dodd-Frank, the 1071 rule. The rules had a very long, winding path. Where do things stand now with that rule and can we expect a version of the rule to be implemented by the CFPB? And if so, when is that ever going to happen?

Bradley Blower:

Yeah. I mean, Dodd-Frank passed in 2010 and here we are in 2025. And the rule which the Biden administration CFPB put out, has been challenged in court and stayed in court. And the second Trump administration has said, "What we're going to do now is we're going to give some breathing room to small business lenders to comply with the rule that was put up by the bureau. And at the same time, we're going to go back and we're going to change that rule before the compliance deadlines come up." So right now, the first compliance dates under 1071 are not until July 2026 for the largest of small business lenders. So 16 years after Dodd-Frank was passed, we're finally going to have a compliance obligation, which could change in the next year if the CFPB puts out a proposed change to the small business data collection rule.

Bradley Blower:

And this rule was put out like HMDA. It was put out to provide some more transparency and sunshine on what businesses are doing so that the public and the government could look for opportunities for businesses to find credit deserts, find areas where more loans can be made, but also to allow private entities in the government to get the data and see if there are discriminatory patterns. And so HMDA's worked and been tinkered with for all these years, but 1071 can't even get out the door and is still in suspension and maybe changed again, yet again, 15 years after it was passed.

Alan Kaplinsky:

Right. You want to add anything, Rich or John? I'd be particularly interested in knowing what you think the CFPB might do to the rule. Do you think what might happen here is they'll just eliminate all the various data that was put into the regulation, but is not in 1071? Is that going to be their emphasis?

Richard Andreano, Jr.:

That would be my guess is what the statute does, similar to HMDA, is it specifies a number of data categories, but gave the Bureau authority to add more. Bureau has that authority owned to HMDA and the rule they adopted many years ago, they in fact doubled the categories that were in there. And that wasn't challenged by the industry. That went into effect and is in effect now. In this one, the reaction in Congress, it was almost like people didn't know Dodd-Frank required the bureau to adopt the rule. And in fact, they were under a court order to issue the rule because they had taken so long to get to the rulemaking. And Congress actually voted to overturn the rule under the Congressional Review Act, but President Biden vetoed it and they couldn't override the veto. Now importantly, a Congressional Review Act only requires a simple majority.

Richard Andreano, Jr.:

Otherwise, if they tried to take it out of the statute, that would be subject to the filibuster. And even the votes to override it, they were in the mid 50s, so there wasn't 60 votes. So unless Congress changes the statute, and I think that would be difficult to change the statute, there will be a 1071 rule. But I think what will happen is they will take a lot of the items that the bureau added in its discretion and take them out and make the rule look much closer to the statute itself. I think that's probably what they'll do. Now the thing is, we're here and it can lead to the end of 2025. The first compliance date is July one. We don't even have proposed rule. That compliance date's going to get pushed out. There's just no way to get a proposed rule out, a final rule in, and then give people time to reprogram their systems and everything to comply with the new rule, whatever it looks like. So I think we're probably looking at 2027 earliest for implementation of this rule.

John Culhane, Jr.:

And the wild card here is the litigation in the DC Federal District Court where the same plaintiffs that sued in California have come back and sued challenging the CFPB's extension of compliance dates, an indication that it's going to reconsider the rule as arbitrary and capricious under the Administrative Procedure Act. So remains to be seen where that's going to go, but I guess we could end up with different decisions in different circuits with the stay in the Fifth Circuit and completely in different order in the DC circuit. That ought to get the Supreme Court review.

Alan Kaplinsky:

Let's turn now to AI, artificial intelligence. Again, something that you refer to, Brad. The Trump administration has issued several executive orders fostering the development of AI, including most recently the White House AI Action Plan. And by the way, another topic that we're going to be covering at the end of this month in a webinar where we were able to recruit one of the major architects of that White House AI Action Plan, a person by the name of Dean Ball. But in any event, can you describe for our audience the tensions here between model governance requirements, fairness and development needs? What are we seeing in terms of federal oversight of the fairness of AI, including generative AI, which maybe you should describe for our listeners, and agentic AI, two terms with which they may not be familiar. Brad?

Bradley Blower:

Sure. So what you saw in the Trump AI Action Plan, as I alluded to at the beginning of the podcast, was a real emphasis on let's not hinder the development of AI. But in the background, you have, as we discussed earlier, you have model risk management rules. There's a requirement that anybody using AI, certainly in the financial space, needs to monitor it for fairness and other compliance requirements. It needs to manage its third parties. There are other statutes like the Equal Credit Opportunity Act and the Fair Credit Reporting Act that require model recent codes to be given out from your... If you're using a model to make decisions about whether you give a loan to somebody, you have to develop those. So all that's still out there. And you still have, I should add, state fair lending laws, state consumer protection. Those all are not preempted by an executive order saying you can't hinder artificial intelligence.

Bradley Blower:

You still have to comply with all of those laws. What I think you're going to see though is the Trump administration included language in that action plan that basically directed the federal government to identify obstacles to the development of AI, including state funding. So I could see a case where the Trump administration could even withhold highway funds or other funds to states that are imposing some kind of guardrails on the development of AI like Colorado and Texas have done in the last year or so. So that's one issue that's out there. And generative AI is basically models are learning from themselves to meet certain goals. And so the AI is going beyond programming and oversight to actually developing its own rationale for moving to the next iteration of the model outside the control of the developers. And Agentic AI is the use of AI to actually be an agent for someone.

Bradley Blower:

And there's great hope there that you could have not just chat boxes, but you could have AI actually advocating and reviewing different models and reviewing different options for consumers and acting as their agent. So as Agentic and Generative AI are being developed and making huge advances in the last couple of years, everybody's using ChatGPT now and other models to do research and to make decisions. Lenders and the financial community have to be really careful still about as they use Agentic AI, as they use Generative AI, are they able to meet all these laws that I talked about earlier?

Alan Kaplinsky:

Including the Equal Credit Opportunity Act.

Bradley Blower:

Yes, including that. And in fact, the state of Massachusetts just entered into a consent agreement with Earnest, which is a student lender based in Delaware, basically saying, hey, the federal government may not be enforcing the disparate impact laws, but Massachusetts is saying, "Hey, Earnest, you and other lenders, you have to review your models for disparate impact, or you're going to face a claim under state law that by not meeting the federal fair lending and state fair lending laws, you violated Massachusetts state law." And so you're going to have, I think you're already starting to see a ramp up in the AI front of states taking additional action, maybe using some of those CFPB employees and employees that worked at other federal agencies to bring cases against lenders and others that are using AI in ways where they're not showing compliance and governance that's sound.

Richard Andreano, Jr.:

It's certainly a change from the Rohit Chopra approach, which was all AI has discrimination baked into it and rattled the saber, really discouraging people from trying to use it. Of course, in the mortgage industry, the three main automated underwriting systems that are used are Fannie Mae, Freddie Mac and FHAs. So there was some protection there because it was basically that you were using federal government systems to do most of your automated underwriting. What I had hoped we get from the bureau, and maybe we still will in other agencies, is give us some best practices. Tell us what you think we should be doing to make sure that how we test, what factors go into the system, how the factors relate to one another. Give us some guidance here rather than just rattling the saber at us. So I hope we get there because I mean, the industry usually likes guidance because then they have some guideposts to use and as they move forward and where they could be safe.

Richard Andreano, Jr.:

Now a big problem is going to be though as users, and we've seen this with other software systems, is you don't know what's in the secret sauce. So it's hard to make your own assessment. And that's something I think the government's going to have to take a look at. Is there a way to get users of these systems comfortable that they could do appropriate assessments to know what's going in so they could better trust what the output is? That's where we need some real help. And we've run into that even before AI, just with regular software systems and how they were processed, particularly the automated underwriting. There were also private versions of those. And if you don't know what's in it, it's hard to do an assessment of its fair lending ramifications. It's almost like you have to take something and apply it against existing applications that you've had in the past and see what the results are and to see if you get the same results as the manual underwriters would have gotten.

Richard Andreano, Jr.:

But that's very time-consuming to do that. So it would be helpful here for the government to really assist and work with the technology providers and work with the finance and other consumer credit providers to get to the same place. Because obviously there's great benefits of enhanced technology, but we could use some guidance here from the government.

Alan Kaplinsky:

Yeah. But Rich, you're assuming the government's got the expertise to create the guidance, right?

Richard Andreano, Jr.:

Yeah. That's why I think they need to work with the industry to do that and bring people in, basically create task forces to do this, because you're going to need the private industry that knows how these systems work and how they think and to really assist the government in creating that guidance because this is well beyond the simple ones and zeros.

Alan Kaplinsky:

Do you have anything to add, John?

John Culhane, Jr.:

I would just add that we didn't really get that guidance from the Commonwealth of Massachusetts. I think to the extent that you look at the Earnest consent order and you look for guidance, the guidance seems to be that if you're going to develop an AI underwriting system and you're going to train it using a judgmental underwriting system that you've already had in place, you should do some analysis of your judgmental underwriting system to make sure that it doesn't show signs of either disparate treatment or disparate impact if you want to have a robust model at the end of the day.

John Culhane, Jr.:

It's kind of hard to know what to make of the Earnest settlement. Earnest paid $2.4 million and maybe that seems like a lot of money, but in the world of fair lending settlements and settlements with state attorneys general, that seems like a relatively small dollar amount. And there were some fairly straightforward issues of non-compliance, inconsistent judgmental overrides, knockout criteria based on immigration status, which the Massachusetts AG didn't like. And then a fairly major problem with adverse action notices at one point in that the adverse action notices were generated using a dropdown box, which had only a limited number of reasons for adverse action and maybe a space for other, which couldn't be used very consistently.

John Culhane, Jr.:

So I was hoping when we saw that the order had been issued, that there was going to be specific guidance from Massachusetts as to what they'd like to see in terms of testing of adverse action reasons or development of the AI underwriting system. But we didn't get a lot other than kind of a reference back to basic model governance and model production rules. So we're going to have to see where this all goes, and I guess it's all going to happen at the state level with state attorneys general.

Bradley Blower:

On the previous podcast I was on with you, during the Biden administration, it was related to asking the Chopra CFPB to put out more guidance, but the Chopra CFPB was very skeptical of models and its effect on consumers and discrimination. And here we have the opposite where you're having a government that's very bullish on AI. So maybe there will be the opportunity for some guidance to come out. That's one area where I'm hopeful, but I'm also at the same time a little concerned that this AI Action Plan, which nothing can hinder AI, there'll be a bias to not putting even some kind of guardrails in terms of what constitutes sound practices and what doesn't coming from the administration.

Alan Kaplinsky:

Okay. Let's turn, we still have a few topics left and not a lot of time. Let's turn to the executive order on deep banking and fair access, which I guess proves that the administration doesn't like it if you discriminate against certain things that it likes, like the Republican Party, and certain businesses that it likes like crypto businesses and other businesses that were not in such favor during the Biden administration, but definitely in favor with the Trump administration.

Alan Kaplinsky:

So let's start with you, Brad, and I'm wondering what you think of this deep banking executive order. I know it's got a lot of our clients in a tizzy. We did a webinar on that topic not so long ago, and we set a record for attendance on any webinar that we've ever conducted. So there's a lot of worry out there among the industry as to what is it... It knows that the CFPB may not be conducting fair lending discriminations other than looking for evidence of deep banking. So what's your reaction to all that?

Bradley Blower:

Yeah. I mean, I certainly am troubled by the fact that the administration would be focusing on this and not on the initial... It's called the Fair Banking for All. Fair Banking for All should cover underserved communities, and instead this Fair Banking For All is really covering industries that this administration wants to promote, like crypto, gun manufacturers now I think would be in that same category. Cannabis, there certainly needs to be an opening up. I would agree with that on the cannabis industry so that there's some kind of way to bank and people aren't being robbed of money because they have to keep cash on hand

because they can't deposit their money in a bank. That's not a good outcome either. But you're going to also, I mean, certainly if you have any kind of prohibitions as a lender on religious institutions, I mean, that would pretty much already be covered under the Equal Credit Opportunity Act because religion is a factor there.

Bradley Blower:

But certainly under this executive order, you don't want to be as a lender or financial institution limiting in any way religious institutions. So my main take is there are a lot of areas where you're going to really need to watch for foot faults here. I think the government will be looking for foot faults. They're certainly not going to bring a disparate impact claim under this for discriminating against whites, like Afrikaner groups and things like that. I don't think you're going to see that happening, but you never know with this administration.

Alan Kaplinsky:

Yeah, yeah. Rich, John, what's your reaction? I mean, I'm sure you've had a lot of clients that have contacted you and have said, "What do we have to do here? What do we have to look at? How far back do we have to go?" By the way, the EEO did not indicate how far back you have to go. It also implicates SBA lending on top of any other type of, not just lending by banks and non-banks, but other services that are offered. So it covers deposit accounts and payment services, et cetera, et cetera, et cetera. Let's start with you, Rich.

Richard Andreano, Jr.:

Yeah. And John and I were actually in a discussion the other day with a few other attorneys. And the one thing was, "Well, how do I come in and audit for this? " He says, "Well, given the lack of any guidelines, it's really hard to do." I mean, what I'd like them to do now is if they're doing this is at the FDIC, the comptroller and the Fed put out exam guidelines. When we come in and look, what are we going to look at and what are we going to... So we have a clue what we actually have to do so we can be prepared. And just basically, we don't have anything. We have these broad statements of intent, but that's not enough. You got to tell people what their obligations are. And if you tell them, then people will know what to do.

Richard Andreano, Jr.:

They may not be thrilled with it, but at least they'll know what the examiners are going to be looking for. But right now, even are you going to have any continuity and examinations for this if you don't have any guidelines? So that to me is a... Come up with a policy first detailed and then announce, don't come up with a policy without any detail. And that's why people now are worried because what do I do? And it's good. Yeah, that's a good question.

Alan Kaplinsky:

Yeah. And my belief is that the claim of widespread discrimination against political parties, Republicans or conservatives, that's anecdotal. I mean, I don't think there's any kind of systemic discrimination in the banking industry. The problem is that there are businesses that banks don't want to get involved with because they're not knowledgeable. They don't have the expertise. Crypto being a good example. They have to lend to crypto companies and crypto exchanges when they got to go out and hire expertise. I mean, that's ridiculous. That's my belief anyway. John, you want to add anything?

John Culhane, Jr.:

We don't have a good idea of what it is that's going to be required here. And we have the analogy of the Bank Secrecy Act where if you have reason to suspect that somebody has approached you and they're committing crimes, that that's, I guess, a reason to not do business with people and to promptly report them to the Department of Justice. But some more guidance here would be helpful. When Rich and I were talking, in the past we've counseled clients about terminating customer relationships and we've recommended that they have policies and procedures that sort of model on what they would have for the Equal Credit Opportunity Act and Regulation B for decision making and appropriate review.

John Culhane, Jr.:

And it looks like that's what's going to be required. But again, we don't know exactly what level of detail or how far back you have to go or what's a good industry and what's a bad industry. Presumably, there may still be some bad businesses that you wouldn't have to do business with as if-

Alan Kaplinsky:

Have any of you heard of any of the regulators actually making inquiries of the industry about this de-banking EO? There's been a lot of talk, but not yet, at least I haven't heard from any client that they've come in to do an exam or that they've made inquiries.

Richard Andreano, Jr.:

I have not yet.

John Culhane, Jr.:

No, I haven't. Although we've speculated that perhaps there may be some review going on of complaints about particular institutions or gripe sites that would be going on at the bank regulatory agencies right now.

Bradley Blower:

Well, and coupled with this is the federal agency, all the federal supervisory agencies, potential regulators, have eliminated reputational risk from their exam manual. So now that adds to this like, "Okay, I can't use reputational risk potentially as grounds for not doing business with somebody." But I think you should be able to look at the background of a company and determine, for instance, if there's a VSAML concern, if it's going to cause discrimination. There are going to be industries that are going to be needed to be vetted very carefully despite the lack of this reputational risk.

Alan Kaplinsky:

Well, and even though you can't use reputation risk, I think they haven't banned the use of safety and soundness concerns.

Bradley Blower:

No, that's right.

John Culhane, Jr.:

No, and obviously for lending, you can't lend to companies if you don't understand, have some understanding of what they're doing and what their business model is. And I think that's going to remain in place. But beyond that, it's a little hard to tell. More than a little hard to tell.

Alan Kaplinsky:

Yeah, yeah. Okay. We have two things left and I want to wrap them up within about three or four minutes. One is the position that was taken by the Biden administration, I should say Rohit Chopra, when they amended the UDAP exempt manual, it's now got to be two or three years ago, maybe longer, to encompass discrimination for the first time. That resulted in litigation, which the industry won at the lower court, went up on appeal, and that's when things came to a grinding halt. I think there was actually an oral argument that was going on at the time, and the government was there to say, "Whoa, stop. We're rethinking the thing." So Brad, what can you tell us quickly? Give us your elevator pitch on that case.

Bradley Blower:

I mean, I was supportive of the Biden policy that how could you say something... And I used to work at the Federal Trade Commission. Unfairness covers things that aren't fair, and how could discrimination be fair? So that's kind of my elemental

approach to it, but I don't think with this administration, certainly they're not going to take that up at all. So it's not a viable theory in this administration.

Alan Kaplinsky:

And do you think that that's certainly with the CFPB, the FTC under their version of UDAP has more of a track record in encompassing discrimination within their UDAP statute. I haven't seen anything happen with nothing. I haven't seen the FTC use that authority under Trump 2.0. You think they're going to abandon that too?

Bradley Blower:

Well, under Biden, the FTC did come out in support of the CFPB's position that discrimination was covered by unfairness. But the FTC has a history, and I worked there as well years ago, they were very reluctant to use the Unfairness Doctrine in the discrimination case. They were much more concerned about... They didn't want to dilute the Unfairness Doctrine in some way. So I certainly don't see that happening under Trump's FTC, and even the FTC administrations before that were reluctant to bring an unfairness claim alleging discrimination.

Alan Kaplinsky:

I will say, I mean, I respect your position, Brad, but I think the Major Questions Doctrine, that the Supreme Court has espoused is with this Supreme Court, I think they would hang their hat on that and conclude that the Biden administration or Rohit Chopra's position is not...

Bradley Blower:

Well, that's the problem with the Major Doctrines though, issue is that it's so malleable to take on whatever issue the court wants to take on. Yeah.

John Culhane, Jr.:

Well, in terms of... I just had one thing to add. I mean, I think the CFPB is gearing up to say that unfairness does not include discrimination. They do have on the regulatory agenda, they have a proposed rule where they're going to define unfair, deceptive, and abusive conduct. And while we all thought that likely meant that they would come up with a new definition of abusive, I think it's also the case that they're going to retrench on unfairness.

Alan Kaplinsky:

Okay. Final issue. Appraisal industry came under increased scrutiny during the Biden administration for alleged bias. Has there been any meaningful change in that industry and is appraisal bias still on the enforcement radar? Brad? I'm going to go to Brad and then I'm going to go to Rich.

Bradley Blower:

Okay. Yeah. Despite much fanfare by the Biden administration with the PAVE effort, not much changed in the four years. There was a lot of announcements and talking to the appraisal foundation, but essentially the system hasn't changed that much and appraisal bias is still a meaningful issue, but this administration is not going to take it up.

Richard Andreano, Jr.:

Yeah. To get real change in the appraisal industry, they need to change who's in the industry. It's highly white and significantly male, and that needs to change to get, I think, better overall representative appraisals. Now, what the Trump administration did was remove all the HUD policies in the FHA world on appraisal bias and reconsideration of value. Surprisingly, however, in the Road to Housing Act that the Senate passed, it would want Amend Truth and Lending Act to add some appraisal bias and reconsideration of value requirements for lenders. And in fact, one of the provisions says if a creditor thinks the original

appraisal reflects discrimination, they really can't use it and they have to order a second appraisal at their expense, but they also have to send the original appraisal to the appropriate government agency that oversees the appraiser. And if that agency agrees that there was discrimination, the original appraiser has to reimburse the creditor for the cost of the second appraisal.

Richard Andreano, Jr.:

So I'm reading this going, "How did this get through the Senate?" Actually believe it or not, they're controlled by Republicans. They're also apparently trying to improve, make it easier for people to become appraisers. They have some provisions that appear to be trying to liberalize the way for state certified appraiser trainees to get into the business and then eventually become appraisers. So that to me is key, is you have to liberalize the way to get people into the industry so it's a more representative industry. And I think that would be a big improvement.

Bradley Blower:

Well, this is one area where AI can be helpful through automated valuation models to kick out appraisals that aren't realistic and get a second appraisal done.

Alan Kaplinsky:

Yeah. Well, we have come to the end of a very lengthy but extremely informative podcast show where I think we've really covered the waterfront of fair lending and what's going on here today. So I want to thank, first of all, our very special guests, Brad Blower, and also they're not guests in any sense, but I want to thank my colleagues, Rich Andreano and John Culhane for their chiming in on Brad's comments. And in particular, I want to thank all of our listeners. And to make sure you don't miss any of our future episodes, you can subscribe to our show on your favorite podcast platform, be it Apple Podcasts, YouTube, Spotify, or any other platform you listen to. And don't forget to check out our blog, consumerfinancemonitor.com for daily insights on the consumer finance industry. If you have any questions or suggestions for our show, please email us at podcastsingular@ballardspahr.com. Stay tuned each Thursday for a new episode. Thank you for listening and have a good day.